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| First Named Applicant: Brookshire |) | Art Unit: 3673 |
| |) | |
| Serial No.: 10/676,593 |) | Examiner: Kreck |
| |) | |
| Filed: October 1, 2003 |) | 1088.008 |
| |) | |
| For: SOLAR POWERED LANDFILL GAS |) | October 20, 2005 |
| EXTRACTION WELL |) | 750 B STREET, Suite 3120 |
| |) | San Diego, CA 92101 |
| |) | |

SECOND SUPPLEMENTAL APPEAL BRIEF

Commissioner of Patents and Trademarks
Washington, DC 20231

Dear Sir:

This brief responds to the attempt to reopen prosecution dated October 18, 2005. The appeal is reinstated. The contents of the original brief and first supplemental brief are incorporated herein. This brief responds to the new issues raised in the office action.

(1)-(5) see original brief.

(6) **Grounds of Rejection to be Reviewed on Appeal**

(a) Claims 1-3 and 7 have been rejected under 35 U.S.C. §102 as being anticipated by Adkins, II (USPN 5,131,888), or in the alternative under 35 U.S.C. §103 as being unpatentable over Adkins, II.

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(b) Claims 6 and 8 have been rejected under 35 U.S.C. §103 as being unpatentable over Adkins, II in view of Staler et al. (USPN 4,453,119).

(c) Claim 5 has been rejected under 35 U.S.C. §103 as being unpatentable over Adkins, II in light of any one of Finley (USPN 776,310), West (USPN 349,549) or Bates (USPN 98,833).

(d) Claims 9, 12-15, 17, and 18 have been rejected under 35 U.S.C. §103 as being unpatentable over Longo, Sr. (USPN 5,857,807) in view of Adkins, II.

(e) Claims 11, 16, and 20 have been rejected under 35 U.S.C. §103 as being unpatentable over Longo, Sr. in view of Adkins, II and further in view of Staler.

(f) Claims 10 and 19 have been rejected under 35 U.S.C. §103 as being unpatentable over Longo, Sr. in view of Adkins, II in light of any one of Finley, West, or Bates.

(7) Introduction

The invention is for a portable landfill well module that has a solar-powered fan. Adkins, II shows an outhouse fan system, while Longo, Sr., is directed to a landfill having a "blower 28" for exhausting methane from the landfill wells without further elaboration about the blower. Accordingly, it is most likely that the blower 28 is a conventional landfill blower that is powered by the main AC electrical power grid.

(a) Argument - Claims 1-3 and 7

Claim 1, which has been rejected under 35 U.S.C. §102 as being anticipated by Adkins, II, recites structure neither taught nor suggested in Adkins, II, namely, that the fan module is configured for engaging a landfill well (Adkins, II is for an outhouse). The anticipation rejection plainly is overcome. Further, the

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claimed fan is between the flanges. In Adkins, II the relied-upon fan 12 is not between the relied-upon flanges 13', 13'' but rather appears to be co-planar with the flange 13'' as shown in Figure 1 so that it can be located at the beginning of the outhouse exhaust pipe 21 as intended by Adkins. The examiner disagrees, alleging that Figure 1 "suggests" that the fan blades are below the flange, but it is simply unclear from Adkins, II that this is the case. Rejections cannot be based on "maybes" but rather on what is plain from the evidence of record.

The above arguments have been met with the allegation that by arguing that the fan module is configured for engaging a landfill well, Appellant is not arguing language found in any claim, on the ground that "the closest" limitation is "communicating with methane" in Claim 1. This allegation borders on the disingenuous. Consider that Claim 1 actually says: "a fan module configured for communicating with methane *in the landfill*....the fan module comprising a fan pipe holding the fan and first and second flanges engaged with opposite ends of the fan pipe *for mating with respective flanges of a landfill well*".

The examiner appears to rationalize his misrepresentation by waving the wand of "intended use" over the above limitations, but the very admission that the recitations are in the claim in the first place gives lie to the allegation. Moreover, these limitations are not mere intended use. The fan module is affirmatively defined as being structurally configured for something specific, namely, not just communicating with methane, which is a formless gas that, standing alone, would be meaningless in a limitation of a fan module, but for communicating with methane *in a particular structure, namely, in a landfill*. For from being a mere "intended use", the word "landfill" in this clause of Claim 1 is necessary to give the clause any meaning. Likewise, the flanges of the pipe module must have a structural quality that is defined in terms of what the structural quality must accomplish, namely, mating with a specific structure - landfill well flanges. This is

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no mere intended use, but a delineation of the specific structure that the claimed flanges must have, in terms of the function they must perform, which, as the Board knows, is an acceptable and indeed ubiquitous modality for claiming structure.

Appellant will not belabor the issue of the fan position vis-a-vis the flanges, since Claim 1 is patentable regardless. However, Appellant notes for the record that the examiner's position that Figure 2 of Adkins, II "plainly shows" that the fan 12 does not extend past the flanges 13 is incorrect as a matter of simple geometry. Figure 2 is a top plan view that cannot show a feature in a dimension normal to the plan.

It is noted that the examiner is so unsure of the anticipation rejection that he tosses in, as a fallback, an obviousness rejection using the same teachings. For reasons above, since Adkins, II is for an outhouse, not a landfill, it cannot suggest the particularly claimed structure of Claim 1 for engaging a landfill. Since Adkins, II is silent as to the precise position of the fan relative to the flanges, it likewise cannot suggest Claim 1.

(7) (b) Argument - Claims 6 and 8

Claims 6 and 8 have been rejected under 35 U.S.C. §103 as being obvious over Adkins, II in view of Staler. Because the underlying independent claim is patentable for reasons above, Claims 6 and 8 likewise are patentable.

(7) (c) Argument - Claim 5

Claim 5 has been rejected under 35 U.S.C. §103 as being obvious over Adkins, II in view of various secondary references allegedly showing support rods, based on the allegation that it would have been obvious

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to use support rods in Adkins, II for "strength". However, nowhere has an identification been made of where Adkins, II might suggest the need for greater strength in its rather small, portable outhouse fan system. Accordingly, regardless of whether such rods are known, absent a specific reason that is relevant to Adkins, II to use the rods (note that the present claims cannot be used as a template to reconstruct the prior art), the proffered suggestion to combine falls for failing to find prior art support.

This has been met with bizarre retort. The examiner simply observes that the motivation "was stated in the rejection", and that "Appellant has failed to provide any evidence of non-obviousness".

Proficiency training time for all conferees, including, somewhat incredibly, the Group Director whose signature it ostensibly is that appears as approving the Answer. Appellant is well aware that the proffered suggestion "was stated in the rejection". So what? If it isn't from the prior art, the rejection falls, MPEP §2143.

As for Appellant failing to establish non-obviousness, the burden, of course, is the opposite during examination. The examiner must provide evidence of obviousness.

(7) (d) Argument - Claims 9, 12-15, 17, and 18

The rejection proposes replacing Longo, Sr.'s blower with the fan of Adkins, II because the fan of Adkins, II is "inexpensive and portable".

Unfortunately for the *prima facie* case, the prior art nowhere motivates "inexpensive and portable" fans for use in landfills, as is otherwise required by MPEP §2143.01 (in seeking to establish a *prima facie* case of obviousness, it must be identified where the prior art provides a motivating suggestion to make the modifications proposed, citing *In re Jones*). "To imbue one of ordinary skill in the art with knowledge of

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the invention, when no prior art reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome", Al-Site Corp. v. VSI Int'l, Inc., 174 F.3d 1308, 50 USPQ.2d 1161 (Fed. Cir. 1999).

Longo, Sr. nowhere suggests that its fan is too expensive (indeed, solar cells are not inexpensive in the first place), or that portability is required. The reason Adkins, II motivates portability - because it is installed in a movable outhouse - is simply not present in the landfill art. Landfills do not move. Thus, the motivation in Adkins, II to use a portable fan system bears no relevance to anything taught in Longo, Sr.

Indeed, only the present invention has made the critical observation that is lacking in the cited references to use a solar-powered fan in landfills. Specifically, as set forth in the present background, "as recognized by the present invention, many landfills may lack the electrical infrastructure to power the various components that are needed to actively eliminate methane from a landfill. Installing the necessary infrastructure can be prohibitively costly." When a patent applicant makes a critical observation that has not been made before and then provides a solution, that is not indicative of obviousness, but rather the opposite - independent Claims 9 and 15 are patentable.

This accurate exposition of the law of obviousness has been met by the examiner with the retort that because an object of Adkins, II is to provide a solar-powered exhaust fan that is inexpensive and easy to fabricate, that makes it obvious to drop it into the landfill well of Longo, Sr., despite providing no evidence from the prior art that such are required in landfills. Sensing the precariousness of his position, the examiner offers a fall back, resorting to a novel "defies logic" standard of unpatentability to find motivation to use a solar-powered fan in a landfill. Appellant will bite. If logic is the only motivation to use an outhouse fan in a landfill well, then why, if the landfill of Longo, Sr. is already hard wired from the electrical grid, would

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a solar-powered fan in that context be "inexpensive" when installing it would mean duplicating energy sources? The logical device of a rhetorical question is here used to underscore Appellant's main point, namely, that unless you recognized the desirability of not wiring the landfill in the first place, something that, based on the evidence of record, only Appellant has recognized, the solar-powered fan of Adkins, II, if used in Longo, Sr., would require more, not less, expenditure than a hard-wired fan. Once again, that old bugaboo of failing to abjure hindsight reconstruction instead of relying on the prior art to provide the suggestion to combine has bitten the nose off the *prima facie* case.

(7) (e) Argument - Claims 11, 16, and 20

For the reasons set forth above in part (d), these dependent claims are patentable.

(7) (f) Argument - Claims 10 and 19

For the reasons set forth above in parts (c) and (d), Claims 10 and 19 are patentable.

Respectfully submitted,



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APPENDIX A

1. A landfill gas extraction system, comprising:
 - at least one fan module configured for communicating with methane in the landfill;
 - at least one fan disposed in the fan module to extract methane out of the landfill when the fan module is engaged with a landfill well of the landfill and the fan is activated;
 - at least one battery for powering the fan;
 - at least one solar panel electrically connected to the battery to recharge the battery, the fan module comprising:
 - a fan pipe holding the fan and first and second flanges engaged with opposite ends of the fan pipe for mating with respective flanges of a landfill well, the fan being disposed between the flanges.
2. The system of Claim 1, wherein the fan is a DC-powered fan.
3. The system of Claim 2, wherein the fan is an axial fan.
5. The system of Claim 1, further comprising at least one support rod extending through at least two flanges.
6. The system of Claim 1, wherein the battery is a rechargeable lead acid twelve volt battery.
7. The system of Claim 1, wherein the solar panel includes an array of solar cells for converting sunlight to electricity.
8. The system of Claim 1, further comprising a voltage controller electrically disposed between the battery and solar panel to maintain a predetermined voltage to the battery.
9. A method for extracting gas from a landfill well, comprising:
 - installing a fan module in the well, the fan module containing at least one DC-powered fan;
 - energizing the fan using at least one battery to cause fluid to be exhausted from the well; and
 - recharging the battery using at least one solar cell.
10. The method of Claim 9, further comprising securing engagement of the fan module with the landfill well using at least one support rod.
11. The method of Claim 9, wherein the battery is a twelve volt lead acid battery, and is the sole source of power for the fan.
12. The method of Claim 9, wherein the fan is an axial fan.

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13. The method of Claim 9, comprising exhausting gas from the well at a rate of about forty standard cubic feet per minute or greater.
14. The method of Claim 9, comprising maintaining twelve volts DC to the battery.
15. A modular landfill gas extraction system, comprising:
fan means in fluid communication with at least one landfill well for exhausting gas therefrom;
battery means for powering the fan means; and
solar power means for recharging the battery means.
16. The system of Claim 15, wherein the fan means includes at least one DC-powered fan disposed in a fan module, the battery means includes a lead acid battery, and the solar power means includes at least one solar panel.
17. The system of Claim 16, wherein the fan is an axial fan.
18. The system of Claim 16, wherein the fan module includes a fan pipe holding the fan and first and second flanges engaged with opposite ends of the fan pipe for mating with respective flanges of the landfill well.
19. The system of Claim 18, further comprising at least one support rod extending through at least two flanges to securely hold the fan module in engagement with the landfill well.
20. The system of Claim 16, further comprising voltage control means electrically disposed between the battery and solar panel for maintaining twelve volts to the battery.

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APPENDIX B - EVIDENCE

None (this sheet made necessary by 69 Fed. Reg. 155 (August 2004), page 49978.)

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APPENDIX C - RELATED PROCEEDINGS

None (this sheet made necessary by 69 Fed. Reg. 155 (August 2004), page 49978.)

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